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United States of America

IN THE

Supreme Court of the United States

OCTOBER 1952 TERM

No. 207

DIVISION 26, OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, PATRICK McINTYRE, individually, and as President of said Division 26, ROBERT HOLLOWAY, individually and as Vice-President of said Division 26, WALTER STANLEY, individually and as Business Agent of Division 26, JOHN FRANCIS, individually and as Secretary-Treasurer of said Division 26, IVOR M. MULLINS, individually and as Sergeant-at-Arms of said Division 26, GEORGE KNOPPE, THOMAS WOOF, JOHN R. GLABAS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS NAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY McKESSON, DAVID LATIMER, individually and as Board Members of said Division 26,

Defendants-Appellants and Petitioners,

vs.

CITY OF DETROIT, a Municipal Corporation by and through FRED P. SISSON, RODNEY BAXTER, and HERMAN L. MOEKLE, as and constituting the Board of Street Railway Commissioners of the City of Detroit,

Plaintiffs-Appellees and Respondents,

and

UNITED DSR EMPLOYEES LOCAL 312 C. I. O. Affiliated with Government Civic Employees Organizing Committee C. I. O., an unincorporated voluntary association and INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C. I. O., an unincorporated voluntary association,

Intervening Defendants-Appellees and Respondents

PETITION FOR REHEARING OF ORDER DISMISSING APPEAL AND TO NOTE JURISDICTION

EDWARD N. BARNARD,
Counsel for Petitioners,
905-11 Dime Building,
Detroit 26, Michigan.

United States of America

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Intervening Defendants-Appellees and Respondents

PETITION FOR REHEARING OF ORDER DISMISSING APPEAL AND TO NOTE JURISDICTION

PETITIONERS pray that this Court grant rehearing of its order of October 13, 1952 granting appellees' motion

to dismiss and dismissing appellants' appeal, and that on rehearing this Court note jurisdiction.

REASONS FOR GRANTING REHEARING AND NOTING JURISDICTION

1. We shall briefly summarize, at the beginning, the reasons why we think a rehearing should be granted, and that this Court should note jurisdiction of the appeal:

The Hutchinson Act[1] marks the appearance of a new type of labor statute. It differs radically from any statute we have seen dealing with employment and discharge of public employees. Its provisions are, on its face, such as to immediately raise questions of its constitutionality. They are, as we claim, arbitrary in terminology and application, and highly oppressive of labor. Being a statute novel in type, and oppressive and arbitrary, and on its face of questionable validity, it is provocative of labor troubles and of litigation, instead of peace between employer and employee. Despite these things, adoption of the statute is spreading rapidly, and it now exists in five states. Need for determination of its validity is therefore widespread. No opinion of any appellate court exists as to its validity, save that appealed from here. This Court is the only court that can finally settle the issue, since it is the final arbiter of the validity of a state law under the provisions of the United States Constitution.

We shall briefly explain the things above summarized:

(a) The Hutchinson Act marks the appearance in the field of labor legislation of a new type of statute.

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[1] This is the popular name of the Michigan statute challenged in this appeal—Act 336 P. A. 1947, C. L. '48, Sec. 423.201 *et seq.*, M. S. A. 17.455 (1) *et seq.* Ready reference may be had to the jurisdictional statement, Appendix D, p. 52 *et seq.*

It is novel in several respects.

It purports to operate directly on the individual employee who is assumed to have struck, and he "thereby" loses his job. Section 2. Any statute we have seen providing for discharge of public employees, defines the alleged misdeed and fixes the penalty, generally leaving it to an administrative agency to impose the penalty, on notice and hearing. Such is the Hatch Act (See *United Public Workers v. Mitchell*, 330 U. S. 75, 67 S. Ct. 566, 91 L. Ed. 745), and so are the charter and ordinance provisions in Los Angeles involving the filing of non-communist affdavits (See *Garner v. Board of Public Works*, 341 U. S. 716, 71 S. Ct. 909, 95 L. Ed. 1317). And see also *Bailey v. Richardson*, 182 F. 2d 46. The operation of the Loyalty Program, and its insistence on fair hearings prior to final job severance, is of course familiar to this Court, and is illustrative.

The Hutchinson Act though it becomes operative only on the single fact that an employee has struck, does not even provide who is to determine this pivotal fact, nor by what procedures it is to be found. The act is dormant until this fact appears, yet no provision at all is made for its determination.

In the case at bar, the appellee city, through the governing commission of the Street Railway System, assumed the authority to make this determination. It did not merely take cognizance of the existence of a strike, as an administrative act, but discriminated between employees and out of 3800 affected employees found that about 250 had not struck, and that the remainder had done so.[2]

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[2] By copies of the minutes of meetings of the Commission, introduced as exhibits on pre-trial proceedings, it appears that the Commission obtained the advice of the Corporation Counsel, and proceeded to make a finding that a strike existed, and sent notices to the employees that their employment was terminated and compensation had ceased. But to about 250, who were found not to have struck, no notice was sent. (R. 74-75, 387-395, 398-401.)

The acts differs from other acts also in applying actual penalties or punishments for striking. After losing his job in the manner explained, of the employee is rehired, he is punished by being on probation for two years, and cannot have a raise in wages for one year. Section 5. The act is penal and punitive.

These things, as well as other things hereinafter mentioned, mark the act as a new type of labor statute. Its novelty is not restricted to merely these features, but we think many features of the act are new to labor legislation, in application if not in substance, some of which are discussed hereinafter in other aspects.

(b) That these things are highly arbitrary, and oppressive of labor cannot be doubted. The arbitrariness and oppressiveness of the act are indicated by the fact that its provisions are enjoined to take effect, "notwithstanding any other provisions of law," three times repeated in the statute. Sections 4, 5, and 6. This effectually wipes out any possibility of Civil Service provisions, to which most public employees are entitled, and as those in this case were.

The act strictly enjoins the public employing agency in most arbitrary terms to observe all the provisions of the act. Section 3.

The Michigan Supreme Court in its opinion spoke only of "limitations and regulations," and avoided the terms "punishment" and "penalties." But the title to the act itself speaks of "disciplinary action," and "penalties." And the act surely provides them.

(c) Being novel in type, oppressive, and arbitrary, the act at once on its face suggests that it is violative of constitutional provisions. It not only performs the legislative function of defining the misdeed and penalty, but assumes also the judicial function of applying the penalty. Doubts

as to its validity arise immediately upon its reading. The strike in the instant cause arose after opinion by counsel for the employees that the act is unconstitutional.

We shall not reiterate arguments heretofore made, save to say that we raise question of due process of law, equal protection of the laws, and bill of attainder.

(d) The essential point is that being oppressive, arbitrary, and a new type of labor statute, and uncertain as to its validity, it is provocative of labor unrest and of litigation. Limitations of the record prevent us from reviewing any litigation that has resulted. But the Court can properly consider that the situation is such as might provoke litigation and dissatisfaction.

It is our considered belief that if the validity of this act is not determined in this appeal, it will inevitably reach this Court from some other source.

(e) The act is most arbitrary in providing for punishment and penalties without the usual safeguards of fair hearing and notice.

When the employee is severed from his job under Section 4, as previously pointed out, he can be re-employed, but only subject to the penalties provided in Section 5. Under Section 7, on petition signed by a majority, the State Mediation Board can act. But the individual has no such right—nor does his Union.

Under Section 6, however, he can petition for a hearing before the employer, to show that he did not violate the act.

But it is obvious that in so doing he is taking on this burden only to avoid the others.

The inescapable feature therefore is that *the moment the individual employee is severed from his job upon assumption of a fact that may or may not exist, by some unauthorized person, he is by the statute placed in a class where he cannot apply for public employment on the same terms as all others.*

He is therefore inevitably punished by the operation of the statute, with no notice and no hearing.

Very likely, no one has a legal right to public employment. *But everyone has a right to apply for public employment on terms equal to all others.*

In *Raney v. County Commission* (1936) 170 Md. 183, 197, 183 A. 548, 554, a state statute provided that legal notices of a county must be published in a publication circulated within the county and which publication had actually set type within the county for four years preceding. A citizen taxpayer sought to enjoin payment to a publisher who had his printing done outside the county. The lower court sustained a demurrer to the bill, and the appellate court affirmed, saying:

> "Appellants suggest that the Legislature has the uncontrolled power to determine who shall and who shall not do the state's work, and that *no person or class of persons are entitled as of right to such work.* But if it be conceded as it must be, that the power of the Legislature to determine through what agencies and means the work of the government is to be carried on and administered is necessarily broad and comprehensive, nevertheless that power is not unlimited, for it, as well as all other branches of the government, is restrained by the Constitution. So *while it is true that no particular person has any right to governmental employment, yet all persons have a right to apply on equal terms for such employment,* and when terms are prescribed as con-

> ditions precedent to such employment, they must be reasonable, and such as have some relation to qualification for the service." (Italics ours.)
>
> *Raney v. County Commissioners* (1936), 183 Atl. 548 (554).

And in *Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356, the court said:

> "The theory on which our political institutions rest is * * *all honors, all positions, are alike open to everyone * * *".
>
> *Cummings v. Missouri*, 4 Wall. 277, 18 Law Ed. 356.

Thus a burden or penalty is inevitably visited upon an individual employee the instant some unauthorized person, without notice or hearing, finds that he has struck.

This is a most arbitrary, oppressive, and novel feature of the state statute in question, and certainly gives rise to substantial questions of its constitutionality.

(f) Any decision of this Court would obviously be of wide application. Many thousands of public employees and their employers, public agencies, in five states[3] are in a situation where the validity of the statute should be ascertained. We believe that the need for such decision may be properly described as acute.

(g) This Court is the only court that can set the controversy at rest. Issues as to the constitutionality of the act under the United States Constitution are inevitably raised not only upon any attempted application of the statute, but on a mere reading. Of these issues this Court is the final arbiter.

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[3] Besides Michigan, Minnesota, ch. 146, Laws of 1951; New York, ch. 391, Laws of 1947; Ohio, S. 261 (1947); Pennsylvania, H. 862 (1947).

No other opinion of any appellate court now exists, save in the decision appealed from. The wisdom and public benefit resulting from an authoritative decision now we hope will be apparent to the Court.

CONCLUSION

For the reasons set forth above, and in the jurisdictional statement, and in the brief filed in opposition to the appellee's motion to dismiss or affirm,[4] it is respectfully urged that rehearing be granted, and that upon such rehearing, jurisdiction be noted.

Respectfully submitted,

EDWARD N. BARNARD,
Counsel for Petitioners,
905-11 Dime Building,
Detroit 26, Michigan.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

EDWARD N. BARNARD,
Counsel for Petitioner.

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[4] Intervening defendants and appellees, C. I. O. Unions, filed a brief in support of the appeal, too late for consideration we think. It contains concise and enlightening comment on the issue of substantial question.

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and

UNITED DSR EMPLOYEES LOCAL 312 C. I. O. Affiliated with Government Civic Employees Organizing Committee C. I. O., an unincorporated voluntary association and INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C. I. O., an unincorporated voluntary association,

Intervening Defendants-Appellees and Petitioner

PETITION OF INTERVENING DEFENDANT AND APPELLEE U.A.W.-C.I.O. FOR REHEARING OF ORDER GRANTING MOTION TO DISMISS APPEAL

NICHOLAS J. ROTHE,
Attorney for Intervening Defendant, Appellee and Petitioner, U.A.W.-C.I.O.,
3610 Cadillac Tower,
Detroit 26, Michigan.

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Intervening Defendants-Appellees and Petitioner

PETITION OF INTERVENING DEFENDANT AND APPELLEE U.A.W.-C.I.O. FOR REHEARING OF ORDER GRANTING MOTION TO DISMISS APPEAL

Petitioner, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America,

CIO, prays that this Court grant rehearing of its Order of October 13, 1952, dismissing the appeal in the above-entitled cause and that this Court deny the motion to dismiss or affirm, and note jurisdiction.

REASONS FOR GRANTING REHEARING AND DENYING THE MOTION TO DISMISS OR AFFIRM

1. At the time of this Court's consideration of plaintiff-appellee City of Detroit's motion to dismiss or affirm, and at the time this Court's Order was entered granting dismissal, the brief of this intervening defendant and appellee in support of jurisdiction and in opposition to the motion to dismiss or affirm was not before the Court. We believe the Court records will show that the brief reached the Court immediately thereafter. That brief, filed under Rule 7 (3) of the Supreme Court Rules, supported the position of the appellant Division 26, and asserted that there was indeed a very serious and substantial Federal question involved, militating toward its consideration by this Court. The position of the petitioner is, together with that of numerous other labor organizations not here parties of record, one of tremendous concern over the consequences of the Michigan Supreme Court decision upholding the "Hutchinson Act". Our brief has been prompted by this concern, and moreover, by the feeling of the petitioner that the statute implies widespread consequences of great breadth and significance which will affect not merely the Division 26 labor union, but the petitioner and other labor unions of *non*-public employees.

We deeply feel that there is a truly substantial question here involved, which may have been brought more fully to the cognizance of the Court had the brief of this petitioner been before it.

2. The above-described October 13, 1952, Order of the Court, states that Mr. Justice Black and Mr. Justice Douglas dissent and "Mr. Justice Burton is of the opinion that probable jurisdiction should be noted." We respectfully submit that where such a large number of Justices of this Court, namely three, have concurred in the arguments of the parties hereto that jurisdiction should be noted and that there is in fact a substantial Federal question, the Court should re-explore the matter in question.

3. A great many labor unions of the country, including this petitioner, representing non-public employees are grievously concerned over the implications of the Hutchinson Act and of the decision upholding it. These labor organizations feel that inferences and conclusions which may be validly drawn from the opinion and decision of the Michigan Supreme Court upholding the Act will likely lead to further improper and unwarranted decisions of law, and the upholding of other legislation equally or more harsh, arbitrary and unconstitutional—decisions and legislation which will adversely affect *all* labor organizations, and their members, and not merely organizations of *public* employees.

Moreover, *we are specifically authorized by the national Congress of Industrial Organizations (C.I.O.) to state that it concurs in all that is stated in this petition, and supports the petition, and it respectfully urges that this Court reconsider and rehear the motion to dismiss, and that it deny said motion.*

In view of the indicated breadth and import of the Michigan Supreme Court decision upholding the Hutchinson Act and in view of the probable adverse effects, as far as all labor organizations in all areas of endeavor are concerned, we most respectfully, though vigorously, urge the Court to reconsider its Order of Dismissal.

4. This petition is filed pursuant to Rule 33 of Rules of the United States Supreme Court.

CONCLUSION

For the reasons set forth above, it is respectfully urged that this Court grant rehearing of its Order of October 13, 1952, dismissing the appeal in the above-entitled cause, and that this Court deny the motion to dismiss or affirm, and note jurisdiction.

Respectfully submitted,

NICHOLAS J. ROTHE,
Attorney for Intervening Defendant, Appellee and Petitioner, U.A.W.-C.I.O.,
3610 Cadillac Tower,
Detroit 26, Michigan.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

NICHOLAS J. ROTHE
Attorney for Intervening Defendant, Appellee and Petitioner, U.A.W.-C.I.O.

PROOF OF SERVICE

Alex Arene, being duly sworn, deposes and says that as an employee of Interstate Brief and Record Company, 642 Beaubien Street, Detroit 26, Michigan, he has charge of mailing and delivering briefs for use in the United States Supreme Court, that on October 22, 1952 he served two copies each of this petition to Hon. Paul T. Dwyer, 301 City Hall, Detroit, Michigan, Ralph Goldsmith, 1637 National Bank Building, Detroit, Michigan and Edward N. Barnard, 905 Dime Building, Detroit, Michigan respectively, by serving same duly addressed to each of the parties.

He also served six copies upon Hon. Edmund E. Shepherd, Solicitor General of the State of Michigan by placing same in the United States Post Office at Detroit, Michigan, postage prepaid, duly addressed.

(Sgd.) Alex Arene.

Subscribed and sworn to before me this 22nd day of October, A. D. 1952.

(Sgd.) Bernice Mitten,

Notary Public, Wayne County, Michigan.
My commission expires September 23, 1956.

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RESPONSE OF CITY OF DETROIT, PLAINTIFF AND APPELLEE, TO THE RESPECTIVE PETITIONS FOR REHEARING BY DIVISION 26, DEFENDANT AND APPELLANT, AND UAW-CIO, INTERVENING DEFENDANT

(For List of Attorneys see inside front cover)

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FACTS

The City of Detroit's employees working on its transit system having struck, the City filed its bill against their Union, Division 26, for injunctive relief and *inter alia* a declaration of rights as to the constitutionality of Michigan's Hutchinson Act (Act 336 P. A. 1947). The UAW-CIO intervened as defendant. The decree holding the Act constitutional was appealed to the Michigan Supreme Court, which also held it constitutional (*Detroit v. Division 26*, 332 Mich. 237), from which decision Division 26 alone petitioned the United States Supreme Court for an allowance of appeal. On May 27, 1952 this was granted.

On June 14, 1952 (within the 15 days allowed by rule) the City filed its "Statement Opposing Jurisdiction and Motion to Dismiss or Affirm" with proofs of service on all original parties.

By October 13, 1952, 121 days later, only Division 26 had filed a brief in opposition to the City's "Statement and Motion", which brief the City did not answer.

On October 13, 1952, the United States Supreme Court entered the following order:

> "*PER CURIAM:* The motion to dismiss is granted and the appeal is dismissed. Mr. Justice Black and Mr. Justice Douglas dissent. Mr. Justice Burton is of the opinion that probable jurisdiction should be noted."

On the following day, the 122nd day after the City's statement and motion had been served on all original parties, the City received from the UAW-CIO a two page brief citing no new law and perfunctorily stating its position that the Act was unconstitutional. Thus prior to the above

decision the UAW-CIO had failed to comply with the United States Supreme Court's rule as to the filing of briefs and cannot now, as a matter of right at least, complain of the above decision by the United States Supreme Court.

Division 26 and the UAW-CIO have each filed a petition for rehearing.

We here answer both petitions and the two page brief.

ARGUMENT

The petitions for rehearing raise only the one point already decided:

> Is there a substantial Federal constitutional question in appellants' claims that the Hutchinson Act violates "due process", "equal protection" and "attainder"?

Appellants have admitted that public employees have no right to strike, and that the State can by legislation prohibit such strikes, and that their three claims of unconstitutionality of the Hutchinson Act were confined to its operation on public employees who have struck. Appellants said:

> "We are not here asserting a right to strike on the part of municipal employees. We are assuming that its prohibition is within the legislative powers of the State. But for the statute to *operate directly* upon the employees, without regard to the desires of their employer, or much less, any decision of an impartial tribunal, and impose 'disciplinary action' and 'penalties' for striking seems to us arbitrary, and clearly in violation of the constitutional provisions invoked."
>
> (Appellants' typed Jurisdictional Statement, pages 24-25.)

The petitions for rehearing contain no new *legal* argument, nor even a new citation with the exception of one case cited in Division 26's petition, *Raney v. County Commission*, 170 Md. 183, 197, 183 A. 548, 554, which states the same principle of law as that in *Garner v. Board of Public Works*, 314 U. S. 716, 71 S. Ct. 909, 95 L. Ed. 1317.

The *Garner Case* held constitutional Los Angeles' legislation denying public employment to advocates of the forceful overthrow of the Federal or State governments and requiring each city employee to make oath that he was not an advocate, failing which his employment ended and he was disqualified for *reemployment*. It authorized *reinstatement* of those *not* guilty; but did not provide for *reemployment* of anyone who *was* guilty. The majority of the Court applied the same test as in the *Raney Case* and thus found the legislation to be "a reasonable regulation to protect the municipal service by establishing employment qualifications of loyalty to the State and the United States." (341 U. S. 721-722, 95 L. Ed. 1323, 71 S. Ct. 913.)

The dissenting opinions did not repudiate the prospective application of this standard, nor hint that similar legislation if purely prospective, such as the Hutchinson Act is, would be unconstitutional.

So that in the instant case—where admittedly public employees have no right to strike and a State, desirous of insuring the continuity of the public service, can by legislation prohibit its employees from striking—the State can, under both *Raney and Garner*, set up prospectively in this legislation such requirements for public employment as are reasonable and have some relationship to qualification for public service.

The particular part of the Hutchinson Act, to which Division 26 applies the *Raney Case*, is its Section 5, which

does not at all affect those who are *wrongfully* discharged for striking and can by hearing obtain *reinstatement* under Section 6, but affects only those *rightfully* discharged for striking and authorizes their *reemployment* without loss of seniority or pension rights.

Division 26's application of the Raney case to Section 5 ignores the plain fact that, under the *Garner Case*, the Hutchinson Act need not for validity contain any provision at all authorizing *reemployment* of the Act's violators. It could, as did the legislation sustained in *the Garner Case*, leave them ineligible for *reemployment*.

But the Hutchinson Act does not forbid, or even fail to authorize, *reemployment* of its violator. It leaves him in every way just as eligible for and as likely to obtain employment as anyone else and in these respects on identical footing with anyone else seeking public employment.

The Hutchinson Act merely operates to authorize the rehiring of the striker and thereafter impose three conditions on his work:

(1) for a year he can have no pay over his pre-strike pay;

(2) for two years he can have no tenure; and

(3) his pension and seniority rights are restored.

While Division 26 denounces all this as "punishment", it is much less punitive than the legislative bar to its violator's *reemployment* which the *Garner Case* sustained as not punitive at all, but as being reasonable and related to qualifications for public employment.

The Hutchinson Act's requirements are even more reasonable and have an even closer relationship to qualifications for public employment. The Michigan Legislature,

to insure the continuance of public business, sought to prevent strikes by public employees by (a) forbidding such strikes, (b) forbidding public officials to authorize, approve or consent to such strikes, and (c) requiring the discharge of both sorts of violators. And then—to insure in advance and before any public employee struck that he would not believe he could get a pay raise by striking and that no public official could circumvent the Act by giving a striker a pay raise for which he might strike—the Legislature declared in Section 5 that no such forbidden strike or forbidden collusion could possibly produce such a pay raise within a year. Thus, the Legislature sought to prevent strikes by, in advance of any strike, making it impossible for such a strike to be successful.

Without the Act's so forbidding the success of a strike, with no restrictions in the Act on the wages of reemployed strikers, the Act would have, in terms, prohibited strikes, but would have, in fact, permitted strikers to achieve the ends for which they violated the prohibition and thus would have nullified the prohibition.

Similarly Section 5's withholding for two years from the rehired striker the benefits of tenure is but a reasonable legislative means to insure to the public that the returned striker would in that period conduct himself in accordance with all rules, regulations and laws, since he could not rely on any aid or protection of tenure laws in doing otherwise. In this respect the rehired striker is, like any other new employee, subjected for a time to probation.

If the Los Angeles' legislation's disqualifying its violator from *reemployment*, is not "punitive" but reasonable and valid—certainly the Hutchinson Act's qualifying its violator for *reemployment* with restoration of pension and seniority rights and under conditions designed to protect

the public against misconduct by the rehired striker, is also reasonable and valid. If legislation forbidding its violators' *reemployment* be constitutional— how then can legislation far more generous in its authorizing its violators' *reemployment* with restoration of pension and seniority privileges, invade the violator's "rights"?

If the offender has no constitutional right at all to *reemployment*, can not the State, even if willing to take another chance on him under such conditions of work as would make him less likely to offend again, reemploy him under any such conditions of his work? *Must* the State always hold out by law to him the legal possibility that by striking for a pay raise in violation of the law he can get such a pay raise? Does the Federal Constitution place each State in such a legal strait jacket that it can protect itself only by (1) barring striking public employees from *reemployment;* or (2) authorizing their *reemployment* only under conditions conducive to the success of their strike? Does the Federal Constitution forbid each State to take any other means of protecting itself? Must the State, if it rehires a striker, immediately give him the protection of tenure laws so that if he soon offends again, the resumption and continuance of public business must await his exhausting all of the procedures of tenure laws up to final decision of the appellate courts?

The "due process", "equal protection" or "attainder" clauses do not guarantee that any public employee not barred from *reemployment* shall have such double "right" and double opportunity to hinder and shut down the local or state governments.

At best constitutional "rights" in respect to public employment are subject to such State regulation as the Legislature, in the exercise of its police powers and of its power

to legislate for the State's self-preservation, may reasonably deem likely to insure the continued functioning of public business. The exercise of these powers for this purpose—by the statutory subjecting of a rehired striker's work to regulatory conditions which make this purpose, the continuous performance of public business, more likely —is not unconstitutional.

Division 26's statement, that the Act's title's mention of "disciplinary action" and "penalties" prevents the Act from being regulatory, ignores the fact that the "penalties" refer only to the Act's Section 8 which applies *only* to "any person not a public employee who incites a public employee to strike", upon whom, after judicial trial and due conviction, fine and imprisonment may be imposed under Section 8. This Section 8 is not here claimed to be unconstitutional.

The remainders of both petitions consist only of criticisms of the Act which, although speciously advanced as legal arguments, have nothing at all to do with either the Act's legal meaning or its constitutionality. All of them are merely sociological and political arguments as to the advisability of this legislation.

The petition by the UAW-CIO presents no new citation or argument of law, but only the vague charge that the United States Supreme Court's previous dismissal of the instant appeal, unless reversed, may, by some unspecified and unknown process, "lead to further improper and unwarranted decisions of law, and the upholding of other legislation equally or more harsh, arbitrary and unconstitutional—decisions and legislation which will adversely affect *all* labor organizations and their members, and not merely organizations of *public* employees."

In this case nothing could be clearer from the Act itself, and from the briefs, records and decisions in this case, than the fact that the Hutchinson Act refers exclusively to *public* employees and *not* to *private* employees at all. (In fact, Division 26 complains that the Act violates "equal protection" because it does *not* refer to *private* employees).

If hereafter in any other litigation any lawyer were to assert that the Act applied to *private* employees, his assertion would be most obviously erroneous and the United States Supreme Court need have no fear that any court would follow such a claim. The here sustained decision of the Michigan Supreme Court is too clear to admit hereafter of any such erroneous interpretation.

In the UAW-CIO's petition the entirely italicized statement that the petition is authorized, supported and concurred in by the national organization of the CIO raises no point of law.

We most respectfully submit to the United States Supreme Court that neither petition raises a new question of law or advances a new legal argument, and that this Court should not here burden itself again with the reexamination of claims so unsubstantial as those the appellants in the instant case have advanced.

They all have already been fully argued, briefed and considered and have been found by a clear majority of the Court to be too unsubstantial to warrant hearing.

CONCLUSION

The petitions for rehearing should be denied.

Respectfully submitted,

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BERT R. SOGGE,
HELEN W. MILLER,
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Dated: October 30, 1952.

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United States of America

IN THE

Supreme Court of the United States

OCTOBER 1952 TERM

No. 207

DIVISION 26, OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, PATRICK McINTYRE, individually, and as President of said Division 26, ROBERT HOLLOWAY, individually and as Vice-President of said Division 26, WALTER STANLEY, individually and as Business Agent of Division 26, JOHN FRANCIS, individually and as Secretary-Treasurer of said Division 26, IVOR M. MULLINS, individually and as Sergeant-at-Arms of said Division 26, GEORGE KNOPPE, THOMAS WOOF, JOHN R. GLABAS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS NAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY McKESSON, DAVID LATIMER, individually and as Board Members of said Division 26,

Defendants-Appellants,

vs.

CITY OF DETROIT, a Municipal Corporation by and through FRED P. SISSON, RODNEY BAXTER, and HERMAN L. MOEKLE, as and constituting the Board of Street Railway Commissioners of the City of Detroit,

Plaintiffs-Appellees,

and

UNITED DSR EMPLOYEES LOCAL 312 C. I. O. Affiliated with Government Civic Employees Organizing Committee C. I. O., an unincorporated voluntary association and INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C. I. O., an unincorporated voluntary association,

Intervening Defendants-Appellees and Petitioner

OBJECTIONS OF THE CITY OF DETROIT, PLAINTIFF AND APPELLEE, TO THE FILING BY THE AMERICAN FEDERATION OF LABOR AND BY THE CONGRESS OF INDUSTRIAL ORGANIZATIONS OF BRIEFS AMICI CURIAE ON PETITIONS FOR REHEARING

In this cause Division 26, defendant and appellant, having been allowed an appeal to the United States Supreme Court, City of Detroit, plaintiff and appellee, filed its "Statement Opposing Jurisdiction and Motion to Dismiss or Affirm" and the Court on October 13, 1952, entered the following order:

> "*PER CURIAM:* The motion to dismiss is granted and the appeal is dismissed. Mr. Justice Black and Mr. Justice Douglas dissent. Mr. Justice Burton is of the opinion that probable jurisdiction should be noted."

Thereafter Division 26, defendant and appellant, and the UAW-CIO, intervening defendant, filed petitions for rehearing to which the City filed its "Response". Since then the Congress of Industrial Organizations and the American Federation of Labor have filed motions for permission to file briefs *amici curiae* to which motions City of Detroit has not consented. Its reasons therefor and its objections to the motions follow:

I.

Neither motion complies with the requirement of United States Supreme Court Rule 27(9)(c) that it "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case".

II.

Neither motion sets forth any facts or questions of law or legal arguments not already considered and decided by the Court and neither one holds forth to the Court the likelihood of anything whatsoever except the mere repetition of arguments already presented to the Court and found by the Court to contain no substantial Federal constitutional question. In fact this is admitted in the very

beginning of the brief *amicus curiae* which the American Federation of Labor has prematurely filed by attaching it to its motion. This brief starts with the words:

> "The points, authorities and arguments set forth by Appellants are concurred in by the American Federation of Labor. Special emphasis will be placed hereinafter on one of Appellants' grounds of appeal"

and proceeds merely to repeat an argument which Division 26 has already advanced to the Court and the Court has already rejected, namely: that the Hutchinson Act denies equal protection of the laws because it applies to publicly owned, and not to privately owned, utilities. The proposed brief then cites three United States Supreme Court decisions *sustaining* State legislation as not denying "equal protection."

We agree with these three decisions. They sustain our position as to the law of "equal protection" and its application.

It is true that the laws there involved were not labor laws but statutes (1) forbidding only unnaturalized aliens to possess shotguns, (2) subjecting only railroad companies owning land on which a noxious weed grows to penalties in favor of adjoining owners, and (3) restricting the hours of operation of wash houses in only a certain area of San Francisco.

More closely in point with the instant case is this Court's more recent decision of *Alabama State Federation of Labor v. McAdory*, 65 S. Ct. 1384, 325 U. S. 450, 89 L. Ed. 1725, in which (as we pointed out in our "Statement Opposing Jurisdiction") an Alabama labor statute applicable to some but not to other labor unions was sustained as affording "equal protection".

III.

Already all grounds of appeal in this case have by briefs of Division 26 and the City been thoroughly argued, have been duly considered by the Court and have been found by the Court to contain no substantial Federal constitutional question. They have been rejected and the appeal dismissed. The petitions for rehearing now before the Court present no new grounds of appeal, nor new argument of law, nor new facts and they should be denied without briefs *amici curiae* especially since neither motion to file such a brief raises a new ground of appeal, argument of law or fact and neither motion complies with Rule 27(9)(c) requiring that it "set forth facts or questions of law that have been, or reasons for believing that they will not adequately be, presented by the parties".

CONCLUSION

We respectfully submit that the motions to file briefs *amici curiae* should be denied.

Respectfully submitted,

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Business Address:
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Dated: November 3, 1952.

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United States of America
IN THE
Supreme Court of the United States

OCTOBER 1942 TERM

No. 207

DIVISION 26, OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, PATRICK SLECTYPE, individually, and as President of said Division 26, ROBERT HOLLOWAY, individually and as Vice-President of said Division 26, WALTER STANLEY, individually and as Business Agent of Division 26, JOHN FRANCIS, individually and as Secretary-Treasurer of said Division 26, IVOR M. MULLINS, individually, and as Sergeant-at-Arms of said Division 26, GEORGE KNOFFE, THOMAS WOOF, JOHN R. ADAMS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS HAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY McKESSON, DAVID LATIMER, individually and as the Members of said Division 26,

Petitioners-Appellees,

vs.

CITY OF DETROIT, a Municipal Corporation by and through FRED P. SISSON, ODDNEY [illegible]TER, and HERMAN L. MOZELL, as and constituting the Board of Street Railway Commissioners of the City of Detroit,

Plaintiffs-Appellees,

and

UNITED DUR[illegible]ERS LOCAL 3[illegible] C. I. O. Affiliated with Governmental Coordinating Committee C. I. O., an unincorporated voluntary association, and INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C. I. O., an unincorporated voluntary association,

Intervening Defendants-Appellees and Petitioners

MOTION OF CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE ON PETITION FOR REHEARING OF ORDER OF DISMISSAL

ARTHUR J. GOLDBERG,
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of Industrial Organizations,
718 Jackson Place, N.W.,

United States of America

IN THE

Supreme Court of the United States

OCTOBER 1952 TERM

No. 207

DIVISION 26, OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, PATRICK McINTYRE, individually, and as President of said Division 26, ROBERT HOLLOWAY, individually and as Vice-President of said Division 26, WALTER STANLEY, individually and as Business Agent of Division 26, JOHN FRANCIS, individually and as Secretary-Treasurer of said Division 26, IVOR M. MULLINS, individually and as Sergeant-at-Arms of said Division 26, GEORGE KNOPPE, THOMAS WOOF, JOHN R. GLABAS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS NAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY McKESSON, DAVID LATIMER, individually and as Board Members of said Division 26,

Defendants-Appellants,

vs.

CITY OF DETROIT, a Municipal Corporation by and through FRED P. SISSON, RODNEY BAXTER, and HERMAN L. MOEKLE, as and constituting the Board of Street Railway Commissioners of the City of Detroit,

Plaintiffs-Appellees,

and

UNITED DSR EMPLOYEES LOCAL 312 C. I. O. Affiliated with Government Civic Employees Organizing Committee C. I. O., an unincorporated voluntary association and INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C. I. O., an unincorporated voluntary association,

Intervening Defendants-Appellees and Petitioner

MOTION OF CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE ON PETITION FOR REHEARING OF ORDER OF DISMISSAL

To the Honorable, The Chief Justice of the United States and The Associate Justices of the Supreme Court of the United States:

Now comes the Congress of Industrial Organizations and respectfully moves this Court pursuant to Rule 27, Paragraph 9 of the Rules of this Court, for leave to file a brief in this case as *amicus curiae* on the subject of and in support of the several petitions filed herein seeking rehearing and reconsideration of the order of dismissal.

The consent of the attorneys for Division 26 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, defendant and appellant, United DSR Employees Local 312 C.I.O., affiliated with Government Civic Employees Organizing Committee, C.I.O., intervening defendant and appellee, and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O., intervening defendant and appellee, to the filing of this brief has been obtained and is hereunto affixed.

The interest of the Congress of Industrial Organizations, petitioner, and its reasons for asking for leave to file a brief *amicus curiae* are set forth below:

The Congress of Industrial Organizations is a voluntary, unincorporated labor association, having affiliated with it a great number of international labor organizations which represent employees in almost every facet of American industry and enterprise. Its membership is in excess of six million workers. Among its constituent labor organizations is intervening defendant and appellee, Local 312, United DSR Employees, a labor organization representing public employees who are directly involved in the instant litigation and are directly affected by the terms of the Hutchinson Act, the subject at issue in the instant litigation.

The Congress of Industrial Organizations, further, is composed of other organizations also representing public employees directly affected by the Michigan Hutchinson Act and by other legislation in other states of a comparable nature.

Moreover the Congress of Industrial Organizations represents numerous other labor organizations including intervening defendant and appellee United Auto Workers, which, while they do not represent public employees, yet are vitally concerned by the implications of the decision of the Michigan Supreme Court upholding the Michigan legislation whose constitutionality is attacked in this litigation.

The Congress of Industrial Organizations is deeply and vitally affected as are its members with respect to the legislation whose constitutionality is here attacked and feels that the Michigan Supreme Court decision portends great and serious consequences for all labor organizations in the United States and their members.

Respectfully submitted,

ARTHUR J. GOLDBERG,
General Counsel for Petitioner, Congress of Industrial Organizations,
718 Jackson Place, N. W.,
Washington 6, D. C.

CONSENT TO FILING OF BRIEF AMICUS CURIAE BY CONGRESS OF INDUSTRIAL ORGANIZATIONS

Now come Division 26 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, defendant and appellant, United DSR Employees Local 312 C.I.O., intervening defendant and appellee, and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O., intervening defendant and appellee, through their respective counsel, and consent to the filing of a brief *amicus curiae* as above described, by the Congress of Industrial Organizations.

EDWARD N. BARNARD,
Attorney for Division 26, Defendant and Appellant.

RALPH R. GOLDSMITH,
Attorney for United DSR Employees, Local 312, Defendant and Appellee.

NICHOLAS J. ROTHE,
Attorney for International Union, UAW-CIO, Defendant and Appellee.

PROOF OF SERVICE

Alex Arene, being duly sworn, deposes and says that as an employee of Interstate Brief and Record Company, 642 Beaubien Street, Detroit 26, Michigan, he has charge of mailing and delivering briefs for use in the United States Supreme Court, that on October 23, 1952 he served two copies each of this petition to Hon. Paul T. Dwyer, 301 City Hall, Detroit, Michigan, Ralph Goldsmith, 1637 National Bank Building, Detroit, Michigan, Edward N. Barnard, 905 Dime Building, Detroit, Michigan and Nicholas Rothe, 3610 Cadillac Tower, Detroit, Michigan respectively, by serving same duly addressed to each of the parties.

He also served six copies upon Hon. Edmund E. Shepherd, Solicitor General of the State of Michigan by placing same in the United States Post Office at Detroit, Michigan, postage prepaid, duly addressed.

(Sgd.) Alex Arene.

Subscribed and sworn to before me this 23rd day of October, A. D. 1952.

(Sgd.) Bernice Mitten,

Notary Public, Wayne County, Michigan.
My commission expires September 23, 1956.

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 207

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, et al.,
Appellants,

vs.

CITY OF DETROIT, ETC., et al.,
Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING OF ORDER DISMISSING APPEAL AND TO NOTE JURISDICTION

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes the American Federation of Labor, by counsel, and respectfully moves this Court, pursuant to Rule 27, paragraph 9 of the Rules of this Court, for leave to file the accompanying brief amicus curiae in support of Appellants Petition for Rehearing of Order Dismissing Appeal and to Note Jurisdiction. Consent of the attorney for Appellant to the filing has been obtained. The consent of the attorney for respondent has not been obtained. The interest of the American Federation of Labor and the grounds supporting this motion are set forth below.

Many thousands of persons employed by public utilities of a proprietary nature are members of labor organizations affiliated with the American Federation of Labor. Many of

these members reside and work in the State of Michigan. Privately owned transportation companies employ some, while others work for municipally owned transportation utilities. All perform identical work in the same industry.

For generations, the American Federation of Labor has sought and achieved improved wages and working conditions for its members. The great social and economic gains were made at great cost and sacrifice. Preserving the basic rights, the vigorous exercise of which aided in securing the gains, constantly occupies the attention of the Movant. Among these rights is the right to be free from discriminatory legislation.

As a responsible organization actively engaged daily in protecting the rights of workers, the Movant desires to present its views in this case. Solely in the interest of protecting its members in Michigan, and all others similarly situated, from arbitrary legal and economic sanctions, the American Federation of Labor respectfully requests that this motion be granted.

Respectfully submitted,

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Washington 5, D. C.
Counsel for
American Federation of Labor

Supreme Court of the United States

OCTOBER TERM, 1952

No. 207

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, et al.,
Appellants,

vs.

CITY OF DETROIT, ETC., et al.,
Respondent.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING OF ORDER DISMISSING APPEAL AND TO NOTE JURISDICTION

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This brief is filed pursuant to Rule 27(9).

The American Federation of Labor respectfully requests that the Court rehear this matter and note jurisdiction.

REASONS FOR GRANTING REHEARING AND NOTING JURISDICTION

The points, authorities and arguments set forth by Appellants are concurred in by the American Federation of Labor. Special emphasis will be placed hereinafter on one of Appellants' grounds of appeal.

We contend that the Hutchinson Act patently violates the Federal Constitution. The Fourteenth Amendment provides:

> "Nor shall any state deprive any person of life, liberty, or property without due process of law, *nor*

deny to any person within its jurisdiction the equal protection of the laws.''

(Emphasis supplied)

This Court has frequently interpreted the equal protection clause and applied it in a number of cases.

In *Barbier v. Connolly,* 113 U.S. 27, 28 L. Ed. 923, 5 S. Ct. 357, the Court stated at page 925:

> ''Equal protection and security should be given to all under like circumstances in the employment of their personal and civil rights . . . that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; *that no greater burdens should be laid upon one than are laid upon others in the same calling and condition.''*
>
> (Emphasis supplied)

But the Hutchinson Act does just that. It imposes the ''capital punishment of industry'' by the summary forfeiture of job, emoluments, pension and retirement rights when a bus driver for a municipally owned transportation company goes on strike in Michigan. However, when a bus driver of a privately owned transportation company in Michigan goes on strike, the Act does not apply. The drivers perform the same duties in the same industry and the effect of a strike upon the public interest is the same in both cases. Yet, the Hutchinson Act imposes a burden on the striking municipally employed bus driver and not upon the privately employed bus driver in Michigan, though they are in the same ''calling'' and work under the same conditions. This is discrimination between persons in the same class.

And the discrimination is arbitrary—it is unreasonable. For the stated basis of distinction between the two groups of drivers in the same class, namely, that the one is a ''public employee'' while the other is a private employee—though true in fact, for constitutional purposes cannot be deemed a substantial distinction justifying the discrimination.

This Court stated in *Potsone v. Pennsylvania*, 232 U.S. 138, 58 L. Ed. 539, 34 S. Ct. 281 at Page 144:

> "A State may classify with reference to the evil to be prevented, and . . . if the class discriminated against is or reasonably might be considered to define those from whom the *evil is mainly to be feared*, it properly may be picked out."
>
> (Emphasis supplied)

The alleged evil the Hutchinson Act aims at is a strike involving a municipally owned transportation company. But it cannot seriously be argued that there is a greater tendency or likelihood for a strike to be called by municipally employed bus drivers than by privately employed bus drivers. The Legislature made no such finding or declaration in enacting the Act, and no such finding in truth could be made. The municipally employed bus driver in Michigan is no different type of individual than the privately employed bus driver. The provocation for a strike was not found by the Legislature to be greater in a municipally owned transportation company than in a private company. There is no genuine reasonable basis to impose a burden upon a bus driver working for a municipality and leave the privately employed bus driver free to exercise his economic rights without peril where the public interest is affected by a strike in the same manner and degree in both cases.

The fact that the stockholder in the one case may be a municipal corporation and in the other private individuals provides the only real basis of distinction. But this Court has never yet held that the mere identity of stockholders constitutes a reasonable basis justifying discriminatory legislation. For the identity of the owners of a profit making business is not even remotely connected with public health, safety, morals and welfare and these interests of society must be directly involved before a state may properly exercise its police power in a manner that imposes unequal restrictions on members of society. *Barbier v. Connolly, supra.*

Discrimination against members of a class by legislation "may be directed against a class when any fair ground for the discrimination exists." (*M.K.T. R.R. Co. v. May*, 194 U.S. 267, 48 L. Ed. 971, 24 S. Ct. 638, page 269.) It is respectfully contended that no fair ground for discrimination between municipally employed bus drivers and privately employed bus drivers was found by the Michigan legislature to justify the Hutchinson Act's application to the Appellants. Therefore, the Supreme Court of Michigan erred in holding the Hutchinson Act constitutional in its application to the Appellants and this Court should rehear the matter and note jurisdiction.

Respectfully submitted,

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